

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY  
10/30/2001

\*\*\* FILED \*\*\*  
11/14/2001  
CLERK OF THE COURT  
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza  
Deputy

LC 2001-000042  
Docket Code 512 Page 1  
FILED: \_\_\_\_\_

STATE OF ARIZONA  
v.  
VALERIE L ICENOGLE

LISA B BARNES  
  
CRAIG W PENROD

PHX CITY MUNICIPAL COURT  
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT  
Cit. No. #5815187  
Charge: 1. DUI OR APC  
DOB: 11/10/60  
DOC: 08/14/99

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This Court heard Oral Argument on October 24, 2001 and this case has been under advisement since that date. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the argument of counsel, the memoranda submitted and the record of the proceedings from the Phoenix City Court.

The only issue raised by Appellant is whether the lower court erred in denying Appellant's Motion for mistrial which was based upon the direct examination of Officer Smith wherein the prosecutor asked the officer why he placed the Defendant (Appellant) under arrest. Appellant claims that the trial court erred in overruling his objection to the question and denying the Motion for Mistrial. Appellant's cites *Fuenning v. Superior Court*<sup>1</sup> for the proposition that it is improper for a police officer to give his opinion of a Defendant's guilt.<sup>2</sup>

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<sup>1</sup> 139 Ariz. 590, 689 P.2d 121 (1983).

<sup>2</sup> Appellant's Memorandum at page 3.

When the prosecutor asked Officer Smith why he arrested Appellant, Officer Smith answered, “the driving that I observed, the field sobriety test that I had given and observed . . . [objection by Appellant’s counsel and the court’s ruling is omitted]. Basically I felt that she was unable to operate a motor vehicle safely and I arrested her.”<sup>3</sup> The trial judge later sustained Appellant’s counsel’s objection and instructed the jury to disregard the question and the witness’ answer.

The Arizona Supreme Court in *Fuenning v. Superior Court*<sup>4</sup> addressed the issue of police officers giving opinions of the state of a Defendant’s intoxication during a Defendant’s trial. Specifically, the Arizona Supreme Court disapproved of opinion testimony that encompasses the witness’ opinion of guilt or innocence of the Defendant. The Supreme Court stated:

When, in a DWI prosecution, the officer is asked whether the Defendant was driving while intoxicated, the witness is actually being asked his opinion of whether the Defendant was guilty. In our view, such questions are not within the spirit of the rules. [citation omitted] Ordinarily, more prejudice than benefit is to be expected from this type of questioning. It ordinarily would be proper to ask the witness in such a case whether he or she was familiar with the symptoms of intoxication and whether the Defendant displayed such symptoms. The witness might be allowed to testify that Defendant’s conduct seemed influenced by alcohol. However, testimony which parrots the words of the statute moves from the realm of permissible opinion which “embraces an” issue of ultimate fact [citation omitted] to an opinion of guilt or innocence, which embraces all issues. This makes it easy for the jury to acquit or convict based on their empathy for the witness, rather than their consideration of the evidence. We see little to be gained and much risk from such methods. [citation omitted]<sup>5</sup>

The answer by Officer Smith did not embrace all the issues to be decided by the jury. The officer’s answer was that he believed Appellant could not operate a motor vehicle safely. This language does not parrot the language of the Driving While Under the Influence of Intoxicating Liquor statute, A.R.S. Section 28-1381(A)(1). Therefore, this Court finds that the trial judge erred in sustaining Appellant’s objection to the question and answer given by Officer Smith. The officer’s answer was not objectionable and the trial judge did not err in denying Appellant’s Motion for Mistrial.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed by the trial court.

IT IS FURTHER ORDERED remanding this case back to the Phoenix City Court for all future proceedings.

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<sup>3</sup> R.T. of November 8, 2000, at pages 163-64.

<sup>4</sup> Id.

<sup>5</sup> Id., 139 Ariz. at 605, 680 P.2d at 136.